

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Court's order whether the case is or not approved for reporting

(Chapter VIII, Rule 32(2) (b))

Description of Case

Criminal Appeal No.159 of 2007
(Old no. 1303 of 1985)

Date of decision :-08.08.2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date :-08.08.2007

Initials of Judge

Note :- Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Criminal Appeal No. 159 of 2007

(Old no. 1303 of 1985)

1. Pooran Chandra
 2. Ramesh Chandra
Sons of Sri Amba Dutt Upadhyay
R/o Village Kaneli,
Police Station Patwari, Chhetra, Jyoli
Dist: Almora
- ...Appellants

Versus

State

...Respondent

Mr. S.K. Agarwal Senior Advocate with Mr. C. K. Sharma and Mr. S. S.Bhandari Advocates for the appellants
Mr. Amit Bhatt, Addl. G.A. for State assisted by Mr.J.S. Virk and Mr. K. S. Mehta Advocates for the complainant.

Coram: Hon'ble Rajeev Gupta, C.J.

Hon'ble J. C. S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

1. This is an appeal against the judgment and order dated 10.5.1985 passed by Sri V.N. Mehrotra, the then Sessions Judge, Almora in Sessions Trial No.35 of 1984, whereby the appellant Pooran Chandra was convicted and sentenced to undergo imprisonment for life and three years' RI under section 302 IPC and section 325 read with 34 IPC respectively. The appellant Ramesh Chandra was convicted and sentenced to undergo imprisonment for life and three years' RI under section 302/34 IPC and section 325 read with section 34 IPC respectively. It was directed that both the sentences would run concurrently.

2. The prosecution case, in nutshell, is that Devi Datt PW6 (injured alongwith his wife Smt. Devki Devi (deceased), his son Girish Chandra, his daughter Smt. Munni Devi and other family members was residing in village Kaneli, Patwari

Kshetra Jyoli, District Almora. Adjacent to the house of Devi Datt, appellants viz. Pooran Chandra and Ramesh Chandra were also residing. On 09.07.1984 at about 4p.m. the appellants-accused with the help of Gopal Singh PW5 were constructing a wall on their courtyard. By constructing the sidewall, they wanted to close the passage of the family members of Devi Datt. When the appellants-accused tried to close their passage, deceased Smt. Devki Devi and Devi Datt objected to it. There was exchange of abuses between them. During the course of the quarrel, appellant Pooran Chandra hit on the head of Smt. Devki Devi(deceased) with a stone, as a result of this, she fell on the ground. The other co-accused-appellant Ramesh Chandra hit on the back of Smt. Devki Devi by 'Kudal'. Devi Datt tried to save his wife, but the appellants caught hold of him and threw him on the ground. Thereafter, appellant Ramesh Chandra also hit him by 'Kudal', due to which his knee was fractured. Thereafter, the appellants-accused fled away from the place of occurrence. The daughter and daughter-in-law of the deceased came at the spot and took them inside the house. In the evening, when Girish Chandra PW1 – son of Devi Datt returned to his house from the duty he found his parents lying in the injured condition. Both of them narrated the incident to him. Smt. Devki Devi-injured, made a dying declaration before her son Girish Chandra PW1 that she had been assaulted by the appellants. Eventually, she succumbed to her injuries at about 6P.m. Thereafter, Girish Chandra PW1 got scribed the report and lodged it before Jagdish Chandra Joshi, Patwari. After lodging the report, the Patwari visited the spot and prepared the inquest report in the night itself. He sent the dead body of the deceased to the hospital for postmortem. He also recorded the statements of the witnesses and

prepared the site plan on the next day i.e. 10.07.1984. He sent the injured Devi Datt to hospital for providing the medical aid. After completing the investigation, Jagdish Chandra Joshi PW9 (I.O) submitted the chargesheet before the court concerned.

3. The accused-appellants were charged and they denied the charges and claimed trial.

4. The prosecution in support of its case examined as many as nine witnesses. Girish Chandra Pw1 – informant is the son of Smt. Devki Devi (deceased) and injured Devi Datt. He proved the dying declaration made by Smt. Devki Devi(deceased). Dr. M.L. Agarwal PW2 has medically examined the injuries of Devi Datt. Dr. G.C. Pande PW3 is the Orthopedic Surgeon who proved the bed-head-tickets, x-ray report of Devi Datt. He found that there was a knee fracture of Devi Datt. Dr. H.G.S. Manral PW4 is the Autopsy Surgeon who conducted the postmortem of the deceased Smt. Devki Devi on 11.7.1984. The prosecution also adduced the evidence of Gopal Ram PW5 who is said to be present at the place of occurrence and was helping the accused persons in constructing the wall. He was declared hostile by the prosecution. Devi Datt PW6 is the injured witness and he was present at the spot at the time of incident. Km. Gita PW7 was also declared hostile by the prosecution and she had not supported the prosecution case. Munni Devi PW8 reached at the place of occurrence immediately after the incident. She also proved the dying declaration of deceased Smt. Devki Devi which was made before Girish Datt PW1. Jagdish Chandra Joshi PW9 is the investigating Officer of this case.

5. After recording the evidence of the prosecution, the accused appellants were examined under section 313 of the Criminal Procedure Code. They have denied all the averments made in the evidence against them and they have stated that they have been falsely implicated in this case.

6. We have heard the learned counsel for the parties and perused the record.

7. It needs to be mentioned here that it is not disputed that the deceased Smt. Devki Devi died on account of the injuries sustained by her on the date of occurrence. Dr. H.G.S. Manral PW4, Medical Officer has conducted the postmortem of the deceased on 11.7.1984 at 12.30 pm and found the following ante-mortem injuries on her person:

(i) Lacerated wound, one in no., of size 3 c.m x 2 c.m bone deep, over left side of scalp 12.5 c.m, above left ear upper lobule, shape-roundish with irregular margin."

(ii) Swelling of size 6 c.m x 5 c.m over left side of back, 4 c.m below lower border of left scapula."

8. Dr. H.G.S. Manral PW4 has opined that the death of the deceased could have been caused at about 5 or 6 p.m on 09.7.1984. The injury No.1 could have been caused by hitting with a stone on her head and injury No. 2 could be caused by the wooden handle of 'Kundal'. He has further opined that she died due to the 'Coma' as a result of head injury. He has further opined that the injury No. 1 was sufficient to cause death in the ordinary course of nature. Thus, it is established that the deceased met a homicidal

death on account of ante-mortem injuries sustained by her on the date of the incident.

9. It is also not disputed that Devi Datt-injured has also sustained injury on his person on the date of occurrence. The prosecution has adduced the evidence of Dr. M.L. Agarwal PW2. Dr. M.L. Agarwal PW2 has medically examined the injured on 10.07.1984 at 4:20p.m. and found the following injury on the person of Devi Datt:-

“Abraded contusion 10 c.m x 7 c.m over upper part of left leg extending upto lower part of thigh. Swelling present over knee joint.”

In the opinion of the Medical Officer, the aforesaid injury sustained by the injured might have been caused on 09.7.1984 at about 4-5 p.m. He has further opined that the injury could be caused by some blunt object, weapon and friction.

10. It is not disputed by the appellants that they were constructing a wall over their courtyard and the deceased objected them. It is also not disputed that deceased Smt. Devki Devi had abused them at the time of the incident. The appellants have admitted that when they were constructing their wall, deceased Smt. Devki Devi reached at the spot to demolish it. When Devi Datt PW6 tried to stop his wife from doing so, there was a scuffle between them as a result of which they fell down on the stones and got injured. Thus, the presence of the appellants, Devki Devi and Devi Datt is not disputed. The defence has put this case by way of suggestion in the cross-examination. According to the prosecution, injury No.1 of deceased Smt. Devki Devi was caused by appellant Pooran Chandra by throwing a stone and injury no.2 was

caused by other appellant Ramesh Chandra with the wooden handle of 'Kudal'. Thus, it is established that the incident took place on 09.7.1984 at about 4 p.m.

11. Now, we have to consider as to whether the appellants were responsible for causing the injuries on the persons of the deceased and injured. The prosecution in support of its case examined Devi Datt PW6 who has sustained injury on his knee at the time of the incident. He has deposed in his evidence that the appellants were constructing the wall on their courtyard. The deponent and his family members had a right of passage to bring water and take their cattle over the courtyard in front of the house of the accused persons. Devi Datt PW6 has further stated in his evidence that when the appellants were constructing the wall on their courtyard, his wife Devki Devi(deceased) and he himself objected them and stated to them that in case the wall was constructed, their passage would be closed. This fact led to exchange of hot words and abuses between Devki Devi (deceased), Devi Datt and the appellants at about 4.30 pm. Thereupon, appellant Pooran Chandra picked up a stone from the spot and hit on the head of Smt. Devki Devi. Meanwhile, Ramesh Chandra appellant also hit on her back with the handle of 'Kudal'. Deceased Devki Devi fell down on the ground due to the injuries caused by the appellants on her person. When Devi Datt PW6 tried to save his wife, the appellants caught hold of him and grounded him. Thereafter, appellant Ramesh Chandra hit him with 'Kudal' on his Knee due to which his knee bone was fractured. After sustaining the injuries, both started crying at the spot. On hearing the hue and cry, the daughter and daughter-in-law of Devi Datt immediately reached at the spot and took them inside the house. When

Girish Chandra PW1, the son of Devi Datt returned to his house from his duties, they narrated the incident to him. The deceased also stated to Girish Chandra PW1 that she had been assaulted by the appellants and thereafter she became unconscious. Devi Datt PW6 was cross examined at length and nothing could be elicited from his cross-examination to discredit his testimony. Devi Datt PW6 remained consistent in the cross-examination with regard to the genesis of the incident. He has sustained the injury at the time of the incident and the prosecution has also proved this fact by the medical evidence. The prosecution has examined Dr. M.L. Agarwal PW2, who medically examined Devi Datt on 10.7.1984 at 4.20 pm. The injury found on his person has been indicated in the preceding paragraph of our judgment. The doctor has opined that the said injury could have been caused between 4 or 5 pm on 09.7.1984. Devi Datt PW6 was admitted in the hospital where his operation of knee was conducted by Dr. G.C. Pande PW3. his bed-head-ticket has been proved by Dr. G.C. Pandey PW3. Moreover, the presence of the injured eye-witness Devi Datt PW6 at the place of occurrence cannot be doubted. He has sustained injury on his knee in the same incident and the prosecution has proved the same. The injured witness stands on a higher pedestal than ordinary eye witness. It is also well settled that the testimony of the injured eye-witness is sufficient to base the conviction and no further corroboration is required. His testimony is credible and cogent. The presence of the injured witness cannot be ruled out. The testimony of an injured witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence lends support to his testimony that the witness was present during the occurrence. {Vide **Narendra Nath**

Khaware Vs. Parasnath Khaware and others 2003 SCC (Cri) 1144 and State of U.P. Vs. Kishan Chand and others 2004 SCC (Cri) 2013}.

12. The prosecution has also adduced the evidence of Gopal Ram PW5, who was present at the time of the incident. He was constructing the wall at the spot. He has not supported the case of the prosecution in-toto, but some part of the incident he has corroborated the fact of incident. Gopal Ram PW5 has stated in his evidence that when the appellants were constructing wall at the spot, Devki Devi objected them and started hurling abuses upon the appellants and asked them not to raise the wall. A quarrel took place between the appellants and the deceased. Gopal Ram PW5 has further stated in his evidence that when the quarrel started among them, he left the place of occurrence and went to his house due to fear and thereafter he did not see the incident. This witness has not supported the prosecution that Pooran Chandra hit the deceased with a stone and Ramesh Chandra hit her with 'Kudal'. He has not deposed that Devi Datt was thrown on the ground by the appellants and he was hit with 'Kudal' on his knee resulting the fracture on his knee. Though he had given such statement under section 161 Cr.P.C. The learned trial court was justified in holding that the witness has only partly supported the prosecution case and he tried to help the appellants on the material particulars. It is apparent from perusal of the record that Gopal Ram PW5 was working for the appellants-accused. It cannot be ruled out that he was under the influence of the accused appellants. However, this witness has corroborated the earlier part of the incident. He has also proved the presence of the appellants-accused, deceased and Devi Datt at the spot. Gopal Ram

PW5 has also proved the factum that a wall was being constructed by the appellants and, they were objected by the deceased and her family members. It is well settled position of law that the evidence of the hostile witnesses can also be relied to the extent it supports the prosecution version. Evidence of such witnesses cannot be treated to be washed of the record. It remains admissible in the trial and there is no legal bar to base the conviction on their testimony. The very object of taking evidence is to discover the truth as far as it is humanly possible for the court to do so. The fact, therefore, that sound public policy requires that a party should not be permitted to malign his own witness, cannot and does not absolve the Court of its own high duty of attempting to discover the truth. Even when a witness deposes in favour of the case of the party calling him, the Court on a consideration of his evidence may either believe or disbelieve him. Even in such a case, the Court has power and duty of deciding whether or not to believe the witnesses. This witness Gopal Ram PW5 has consistently proved the first part of the incident and he corroborated the evidence of the injured only to that extent.

13. The prosecution has also examined Smt. Munni Devi PW8, daughter of deceased Smt. Devki Devi. She is not the eye-witness of the incident. She reached at the spot immediately after the incident and took her parents inside the house in the injured condition. The prosecution also adduced the evidence of Km. Gita PW7 who has not supported the prosecution version. After considering the entire evidence, the learned trial court found the evidence to be implicitly credible and cogent. The presence of Devi Datt PW6 at the place of incident cannot be doubted. The manner of assault

as described by the prosecution is also supported by the medical evidence. The FIR was lodged with promptitude. So far as the duration of injuries on the person of the deceased is concerned, the opinion of the doctor is that the injuries were possible at the time of incident. We have gone through the entire evidence and found that the evidence of Devi Datt PW6 coupled with the medical evidence and the evidence of Gopal Ram PW5 is sufficient to fasten the guilt on the appellants. The evidence of the prosecution is consistent. We do not find any infirmity in the evidence of the prosecution witnesses.

14. It has come in the evidence that Smt. Devki Devi had given her statement immediately before her death to Girish Chandra PW1 and Smt. Munni Devi PW8. The prosecution has adduced the evidence of Girish Chandra PW1 (informant) who has stated that when he returned to his house at about 6 pm from the duty, he found his parents lying in the room in the injured condition. Girish Chandra PW1 has further stated in his evidence that his mother Devki Devi had stated to him that appellant Pooran Chandra hit with a stone on her head and appellant Ramesh Chandra hit her with 'kudal'. Girish Chandra PW1 has stated in his evidence as follows:

“मैंने अपने माताजी और पीताजी से पूछा कि आप लोगों को चोटें कैसे आई. इस पर माताजी ने रुक -2 कर मुझे बतलाया की उन्हें पूरन चन्द्र और रमेश चन्द्र ने मारा है पत्थर और कूदाल से”।

15. Girish Chandra PW1 has further stated in his evidence that after saying those words his mother died after half an hour. Girish Chandra PW1 – informant has also indicated this fact in the FIR. Smt. Munni Devi PW8 has stated in her evidence as follows:

“उसके बाद मेरा भाई आया। मेरे भाई ने माँ से व पीताजी से पूछा। मेरी माँ ने इतना बोला कि अम्बादत्त के लड़के रमेश और पूरन ने मेरी यह हालत कर दी उसके बाद मेरी माँ बेहोश हो गई और फिर उसने दम तोड़ दिया”।

16. Dr. H.G.S. Manral PW4 who conducted the autopsy on the dead body has stated in his cross-examination that the deceased was so serious and she would have remained unconscious after receiving the head injury. On internal examination, Dr. H.G.S. Manral PW4 found that there was a depressed fracture of left parietal bone under injury No.1. Bone pieces embedded in brain matter . Membranes were congested and torn under fractured bone. He has further found that there was a haematoma of size 6cm x 5cm under fractured bone. He had also indicated in his evidence that brain material was lacerated under fractured bone. Looking to the condition of the injury, it would not be possible that the deceased would have remained conscious after sustaining the head injury. Considering the injuries and the evidence of Dr. H.G.S.Manral PW4, we are of the view that the trial court was justified in holding that it would be doubtful that Smt. Devki Devi could have made a dying declaration after about two hours of the incident. The trial court was further justified in holding that even if the prosecution evidence on this point may not be taken as convincing and reliable, there is other ocular evidence which is sufficient to establish the prosecution case.

17. The learned counsel for the appellants vehemently contended that if the appellant Pooran Chandra is held guilty for inflicting fatal injury on the person of deceased Smt. Devki Devi, then he is liable for culpable homicide not amounting to murder as he lacked the requisite intention to

cause the death. It was further contended that the scenario projected by the prosecution clearly rules out the application of section 302 IPC. The scenario projected by the prosecution clearly shows that the assault was made in the course of a sudden quarrel. There was no pre-meditation. Only one blow by throwing a stone was given to the deceased. In essence, it was contended that section 302 IPC has no application and in essence Fourth exception of section 300 IPC applies. Learned Addl. G.A. refuted the contention and supported the judgment of the trial court. The pivotal plea taken by the appellants relates to the applicability of Exception 4 of 300 IPC. For bringing in its operation it has to be established that the act was committed without premeditation, in a sudden fight in the heat of passion upon a sudden quarrel without the offender having taken undue advantage. The Fourth Exception of Section 300 IPC covers acts done in a sudden fight. The said Exception deals with a case of prosecution not covered by First Exception. The help of Exception 4 can be invoked if death is caused (a) without premeditation; (b) in a sudden fight; (c) without the offender's having taken undue advantage or acted in a cruel manner, and (d) the fight must have been with the person killed.

18. In Virsa Singh Vs. State of Punjab AIR 1958 SC 465 & 1958 Cr.L.J. 818, the Supreme Court has held that a culpable homicide is a murder under section 300 clause III. If the prosecution should establish four elements – (i) the presence of bodily injury, (ii) nature of such bodily injury, (iii) intention on the part of the accused to inflict that particular bodily injury, that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and (iv) the injury was sufficient to cause

death in the ordinary course of nature. Dealing with the question, as to how intention is to be inferred, Vivian Bose J. succinctly stated:-

“In considering whether the intention was to inflict the injury found to have been inflicted, the enquiry necessarily proceeds on broad lines as, for example, whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted.

The question is not whether the prisoner intended to inflict a serious injury or a trivial one but whether he intended to inflict the injury that is proved to be present . If he can show that he did not, or if the totality of the circumstances justify such an inference, then, of course, the intent that the section requires is not proved. But if there is nothing beyond the injury and the fact that the appellant inflicted it, the only possible inference is that he intended to inflict it. Whether he knew of its seriousness, or intended serious consequences, is neither here nor there. The question, so far as the intention is concerned, is not whether he intended to kill, or to inflict an injury of a particular degree of seriousness, but whether he intended to inflict the injury in question; and once the existence of the injury is proved the intention to cause it will be presumed unless the evidence or the circumstances warrant an opposite conclusion. But whether the intention is there or not is one of fact and not one of law. Whether the wound is serious or otherwise, and if serious, how serious, is a totally separate and distinct question and has nothing to do with the question whether the prisoner intended to inflict the injury in question.”

19. We have given our thoughtful and anxious consideration to the rival contentions of the learned counsel for the parties. The intention which is a state of mind cannot be proved by the direct evidence as a fact. It can only be inferred from the facts and circumstances of each case. Therefore, the court should proceed to decide the pivotal question of intention, with care and caution, as that will decide whether the case falls under section 302 or 304 Part-I or 304 Part-II. The intention to cause death can be gathered generally from a

combination of a few or several of the following, among other, circumstances: (i) nature of the weapon used; (ii) whether the weapon was carried by the accused or was picked up from the spot; (iii) whether the blow is aimed at a vital part of the body; (iv) the amount of force employed in causing injury; (v) whether the act was in the course of sudden quarrel or sudden fight or free for all fight; (vi) Whether the incident occurs by chance or whether there was any premeditation; (vii) whether there was any prior enmity or whether the deceased was a stranger; (viii) whether there was any grave and sudden provocation, and if so, the cause for such provocation; (ix) Whether it was in the heat of passion; (x) whether the person inflicting the injury has taken undue; advantage or has acted in a cruel and unusual manner; (xi) whether the accused dealt a single blow or several blows. In the present case, as noticed above, the appellant-Pooran Chandra picked up a stone from the place of occurrence. He was not armed with deadly weapon at the time of incident. Appellant Pooran Chandra has inflicted only a single blow by throwing a stone on the deceased. He had not repeatedly thrown the stones on the deceased. If he had an intention to cause death of the deceased he would have inflicted several injuries by throwing stone on the person of the deceased it is not in dispute that a head injury was inflicted on the side of scalp above left ear and only one lacerated wound was caused by the appellant Pooran Chandra. The prosecution has not led any evidence that there was any dispute in between the parties before the date of incident and as such there was no animosity between the parties. There was no pre-meditation. The stone was thrown towards the deceased in the course of a sudden quarrel. It is also in the evidence that the second injury found on the back

of the deceased was caused by appellant Ramesh Chandra with wooden handle of 'Kudal'. He has not used the pointed/sharp side of 'Kudal'. He has not repeated the blows of 'Kudal' on the person of the deceased. The stone and 'Kudal' which were used in the commission of crime are not the conventional weapon. The fatal injury was inflicted by throwing a stone as projected by the prosecution. If the appellants would have an intention to kill the deceased, they would have brought such a weapon by which they could have inflicted grievous injuries on the person of the deceased. The circumstances as indicated above lead to take an inference that there was no motive or intention of the appellants to cause death of the deceased. The appellants were constructing a wall in their courtyard, deceased Smt. Devki Devi and injured Devi Datt objected them due to which a hot altercation took place between them. 'It was a sudden fight between the parties. Thus, the presence of the assailants at the spot is sudden and there was no premeditation to cause injury on the person of the deceased. When the above factual scenario is tested on the above principles, the conclusion is that the conviction under section 302 IPC cannot be maintained and the conviction has to be altered under Section 304 Part-II IPC. We, therefore, hold that the appellant Pooran Chandra is liable to be convicted under section 304 Part-II IPC instead of section 302 IPC.

20. It was further contended that appellant Ramesh Chandra has been sentenced to undergo imprisonment for life and for a period of three years' RI under section 302/34 IPC and section 325/34 IPC respectively. It was contended that if the evidence against the appellant Ramesh Chandra is found credible and cogent, he is only liable to be convicted for

causing grievous hurt to the deceased and as such he is liable to be punished under section 325 IPC. It was further contended that the scenario projected by the prosecution clearly rules out the application of section 302/34 IPC in this case. It was further contended that the prosecution has also led the evidence that appellant Ramesh Chandra also caused injury on the knee of injured Devi Datt. The offence even if the evidence is found credible and cogent comes within the purview of section 325 IPC only. It was contended that the assault given by him was in the course of a sudden quarrel and there was no pre-meditation. Learned Addl. G.A. refuted the contention.

21. The prosecution has led the evidence that Ramesh Chandra hit on the back of the deceased with 'kudal' and he also hit the injured Devi Dutt with 'Kudal'. He has not used the pointed/sharp side of the 'kudal. No attempt was made by the appellant-Ramesh Chandra to cause serious injury on any vital part of the body of the deceased. The appellant-Ramesh Chandra could have caused injury on the head or chest or other vital part of the body of the deceased. Intent which is a state of mind cannot be proved by precise direct evidence; as a fact, it can only be detected or inferred from other factors. Some of the relevant considerations may be nature of the weapon used, the place where the injuries were inflicted, the nature of injuries and the circumstances in which the incident took place. 'Kudal', which was used in the crime, is not a conventional weapon. The injury was inflicted by 'Kudal' as projected by the prosecution. If the appellant-Ramesh Chandra would have an intention to kill the deceased or injured he would have brought such a weapon by which he could have inflicted grievous injuries on their persons. The

injury was inflicted on the back side of the deceased and according to a layman it cannot be a vital part of the body. If the appellant-Ramesh Chandra would have an intention to cause the death of the deceased he would have inflicted injury on the head or chest of the deceased. He would have further repeated the assault on the person of the deceased. There is no evidence that he repeated the assault by the 'kudal'.

22. So far as the conviction of appellant Ramesh Chandra with the aid of section 34 IPC is concerned, to attract the provision of section 34 IPC two postulates are indispensable. (1) The criminal act (consisting of a series of acts) should have been done, not by one person, but more than one person, (2) Doing of every such individual act cumulatively resulting in the commission of criminal offence should have been in furtherance of the common intention of all such persons. To attract the applicability of section 34 IPC the prosecution is under obligation to establish that there existed a common intention which requires a pre-arranged plan, because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention. There is no gainsaying that a common intention presupposes prior concert, which requires a prearranged plan of the accused participation in an offence. Such pre-concert or preplanning may develop on the spot or during the course of commission of offence but the crucial test is that such plan must precede the act constituting an offence. Common intention can be formed previously or in the course of occurrence and on the spur of the moment. The existence of a common intention is a question of fact in each case to be proved mainly as a matter of

inference from the circumstances of the case. In the case in hand, the prosecution has led the evidence that appellant-Ramesh Chandra , who has been convicted under section 302 IPC with the aid of section 34, remained at the scene of occurrence without sharing the common intention. Though he had caused an injury on the person of the deceased. The act of the appellant was not within the purview of section 34 IPC. The common intention implies a pre-arranged plan. Such common intention which developed on a spur of moment, is different from the similar intention actuated by a number of persons at the same time. We have already held that it was a sudden quarrel and there was no pre-arranged plan to cause fatal injury to the deceased. The appellants were not armed with the conventional weapons. Appellant Pooran Chandra simply picked up a stone and thrown it on the deceased. The appellant Ramesh Chandra never exhorted to Pooran Chandra to cause injury on the person of the deceased. The prosecution has not succeeded in proving that the appellant Ramesh Chandra had a common intention. We, therefore, hold that the learned trial court has erred in holding that appellant Ramesh Chandra shared a common intention with Pooran Chandra to cause injury on the person of the deceased. Appellant Pooran Chandra had no common intention with Ramesh Chandra to cause the grievous hurt to the deceased and the injured. Both the accused-appellants are liable to be punished for their individual acts. Thus, the appellant Ramesh Chandra cannot be convicted under section 304 Part II with the aid of section 34 IPC. The prosecution has amply proved by the evidence that Ramesh Chandra hit the deceased on her back by 'Kudal'. This fact has been proved by the evidence of Devi Datt PW6 and other attending circumstances of this case. Dr. H.G.S. Manral PW5 who had conducted the

autopsy on the dead body of the deceased found swelling over the left side of the back as injury No. 2. He has also opined that haematoma of 7 cm x 6cm was present under injury No. 2. Thus, the injury on her back was grievous. As such, Ramesh Chandra is liable to be convicted under section 325 IPC for causing grievous injury to the deceased.

23. It is also established by the prosecution evidence that the appellant Ramesh Chandra also hit Devi Datt with 'Kudal' as a result of which his knee was fractured. He was medically examined on the next day of the incident. An abraded contusion was found on his knee joint. X-ray of the injured was taken and it was revealed that bone of left knee was fractured. It was operated by Dr. PW3 G.C. Pande who proved the Bed-Head-Ticket and the injury report. Thus, it is amply proved that appellant Ramesh Chandra voluntarily caused grievous hurt on the person of injured Devi Datt PW6. Therefore, Ramesh Chandra is liable to be convicted under section 325 IPC for causing grievous injury to the injured Devi Datt PW6.

24. In view of the foregoing discussion, the appellant Pooran Chandra is convicted under section 304 Part II IPC instead of 302 IPC. It would be just and proper looking to the facts of the case to award the custodial sentence of seven years. The appellant Ramesh Chandra is convicted under section 325 IPC for causing the grievous hurt to the deceased. Again, Ramesh Chandra is convicted under section 325 IPC for causing the grievous injury on the person of the injured. It would be just to award the custodial sentence of three years' RI under section 325 IPC on each count. Both these sentences will run concurrently.

25. The appeal is partly allowed. The conviction and sentences awarded by the trial court against the appellants are partly set aside. We accordingly alter the conviction of the appellant Pooran Chandra from section 302 IPC to section 304 Part II IPC. We also alter the conviction of the appellant Ramesh Chandra from section 302/34 IPC to section 325 IPC for causing grievous hurt to the deceased. We also alter the conviction of the appellant Ramesh Chandra from section 325/34 IPC to section 325 IPC for causing the grievous injury on the person of the injured. The impugned judgment and order passed by the trial court is modified accordingly.

26. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within two months.

(J.C.S.Rawat, J.)

(Rajeev Gupta, C,J.)

Dated 08th August, 2007

LSR/ VK